No. 9055

In the United States Circuit Court of Appeals for the Ninth Circuit

CITY AND COUNTY OF SAN FRANCISCO, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

SUPPLEMENTAL BRIEF FOR APPELLEE, UNITED STATES

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INDEX

CITATIONS

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QUESTION PRESENTED

At the close of the argument of this case, the Court directed that the parties file briefs on the question:

> Whether or not the prohibition against the selling of the right to sell and, of course, letting [contained in section 6 of the Raker Act of December 19, 1913, 38 Stat. 242] which is another way of saying leasing—whether the selling or letting of the right to sell refers to a franchise, which, under the terms of the San Francisco City Charter, could only be given by offering for sale at

public auction and would be technically and strictly a selling or letting of the right to sell.

STATUTES AND CHARTER PROVISIONS INVOLVED

The relevant articles of the California Constitution of 1879, Art. XI, sec. 19, and as amended October 10, 1911, and Art. XIV, secs. 1 and 2; the San Francisco Charter of 1899, Art. II, secs. 1 (2) (14), 5, 6, and 7 (Calif. Stats. 1899, p. 247) are set forth in the Appendix.

ARGUMENT

I

The prohibition of section 6 of the Raker Act includes sale for resale and the granting of agency to sell electric energy generated at Hetch Hetchy

A. The prohibition does not refer to the granting of a franchise by the municipality

It is essential to the character of a right as a franchise that it be a grant of a privilege emanating from, and conferable only by, sovereign power. *Bank of Augusta* v. *Earle,* 13 Pet. 519, 595; *California* v. *Pacific Railroad Co.,* 127 U. S. 1, 40–41; *Bank of California* v. *San Francisco,* 142 Cal. 276, 280, 75 Pac. 832; *The People* v. *Continental Ben. Ass'n,* 280 Ill. 113, 115, 117 N. E. 482 (1917).

The prohibition of section 6 of the Raker Act is against "selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell

or sublet the water or the electric energy sold or given to it or him by the said grantee."

The California Constitution, Art. XIV, sec. 2, provides:

> The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law.

1. This section of the California Constitution defines a franchise as the "right to collect rates or compensation for the use of water." Since this is not identical with the phrase in section 6—"right to sell water"—the similarity in phraseology of the two provisions affords no basis for inference that the subject matter of section 6 of the Raker Act was intended by Congress to be the same as that of section 2 of Article XIV of the California Constitution.

2. The context of the phrase in section 6 of the Raker Act clearly shows that it was not used in the sense of "franchise." Congress did not say to San Francisco: "You may not, with reference to Hetch Hetchy water and energy, confer on a private corporation or an individual a franchise to sell within your confines, but you may confer upon municipalities over which you have no control a franchise to sell outside your limits." It was manifest to Congress that San Francisco could not confer franchises to operate beyond its limits and

therefore neither the exception nor the prohibition can be taken as referring to franchises.

Again, the right to sell, granting of which is prohibited by section 6, is not the right to sell all water or energy from whatever source derived, but only the right to sell the Hetch Hetchy water or energy obtained from the City. It is much more reasonable to believe that Congress was restricting the City in dealing in a proprietary capacity with water and energy obtained by the use of the property of the United States rather than that it was attempting to interfere with the City in the exercise of its delegated sovereign power of granting franchises.

3. Furthermore, such an interpretation would prevent the City's disposition of the electric energy except to such private corporations or individuals as already had franchises. It is conceded in the brief of the City (pp. 9–10),[1] that both the Spring Valley Water Company and the Pacific Gas & Electric Company at the time of the passage of the Raker Act were under California Constitution, Art. XI, sec. 19, vested with franchise rights in San Francisco to distribute water (*Lukrawka* v. *Spring Valley Water Co.*, 169 Cal. 318, 146 Pac. 640 (1915); *Russell* v. *Sebastian,* 233 U. S. 195 (1914)) and electric energy (*Matter of Application of Kep-*

[1] Unless otherwise specified, references herein to the brief of the City are to the "Opening Brief after Argument."

pelmann, 166 Cal. 770, 138 Pac. 346 (1914)), respectively. In practical effect, therefore, construction of the prohibition as referring to a franchise would prevent the disposal of the energy to any other private corporation and permit its disposal only to the Pacific Gas & Electric Company which is the very "monopoly" from whose hands Congress sought to keep the benefits of its grant. The language of the Act should be construed so as to effectuate, not to defeat, the evident purpose of the legislation. *St. L. & O'Fallon R. Co.* v. *United States,* 279 U. S. 461, 484; *Royal Ind. Co.* v. *American Bond Co.,* 289 U. S. 165, 169.

4. Again, as pointed out in the City's brief (pp. 33–34), to construe section 6 of the Raker Act as an attempt by the United States to restrict the power delegated by the State to the City to grant franchises (Calif. Const., Art. XI, sec. 19, as amended October 10, 1911, Appendix, *infra,* p. 22) would be to raise grave doubts as to its constitutionality. Such construction, of course, is to be avoided. *Richmond Co.* v. *United States,* 275 U. S. 331, 346; *Reinecke* v. *Trust Co.,* 278 U. S. 339, 348–349.

B. The scope of the prohibition of section 6 of the Raker Act does not exclude sale, lease, or gift of the water or energy

Another construction of section 6 suggested as possible from the bench was that it does not prohibit the grantee from selling any electric energy

to anybody for any purpose; that it only prohibits the grantee from selling the right to sell under certain circumstances.

It is submitted that, as the City contends (Br. 12), sale for resale is prohibited, and that this suggestion, insofar as it implies that sale for resale ~~under certain circumstances~~ is not prohibited, is no more tenable than that discussed under Point I (A) above.

The debates in Congress (Appellee's Br. 62–63) and the Act itself clearly show an intent on the part of Congress, in pursuit of its purpose to avoid the possibility of private monopoly, that the benefit of the grant by the United States should be enjoyed by private corporations or individuals only to the extent that they might obtain the energy generated at Hetch Hetchy as ultimate consumers. Equally clear is an intent that the additional benefit of the grant, arising out of the right to sell the energy generated at Hetch Hetchy should be enjoyed only by the City and its transferee municipalities and by them alone. Obviously, if this benefit, the privilege of selling the energy, might, by outright sale, agency, or in any other manner, be transferred by the City to any private corporation or individual, the purpose and intent of Congress would be thwarted. Congress sought out the strongest terms it could find to prohibit a transfer by the City grantee to any private corporation or indi-

vidual of an unrestricted ownership of the energy or water. Any sale or transfer by the City to such a corporation or individual must be of such nature that it does not carry with it the right to sell. The use of the broad phrase "right to sell or sublet" in the prohibition, rather than the narrow "sale for resale" was much more appropriate to the attainment of the end in view. Thus, construed according to its literal wording and in accordance with the underlying intent and purpose of Congress, the statute clearly prohibits a sale which permits a resale, in other words, a conveyance of the entire unqualified interest, since necessarily such a conveyance to the Company would vest in it the right to sell or let the energy so conveyed. The statute can be given no real effect except by construing it as a prohibition against the City's transferring by any method to a private corporation or individual its right to sell the electric energy developed through its utilization of the rights and privileges granted by the Raker Act.

Furthermore, interpretation of the prohibition as extending merely to the transfer of the abstract right to sell, is subject to most if not all of the objections to its construction as relating merely to granting of franchises discussed above.

The Government agrees with the City that there is no warrant for construing the words "right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee" as re-

ferring to a franchise right or as not including a sale for resale.

II

Supplemental brief

The question raised by the Court is briefed in Point I. Certain extraneous statements made by the amicus curiae and the City in the so-called Outline of Oral Argument and in Opening Brief following Argument require brief attention.

A. Section 6 of the Raker Act does not require public distribution of electric energy without intervention of an agent

Contrary to the statement in the Outline of Oral Argument (p. 17), the Government has never argued "that section 6 requires public distribution of the energy, meaning thereby without the intervention of an agent" and there is nothing in the decree which requires that the City make distribution without an agent.

The prohibition of the statute is against the granting to an individual or private corporation of the right to sell. Solicitor Edwards recognized that it did not prohibit employment of an agent for transmission purposes (R. 353–355) and the Government has never contended to the contrary. The thing prohibited is a grant by the City to a private individual or corporation which will carry with it the right, either as owner or agent, to sell water or energy delivered to such individual or corporation by the City (see Gov't Br., p. 67).

B. The Raker Act forbids the City to grant to a private company the right to sell the energy irrespective of whether the company is acting as an agent or as a buyer

As stated in the City's brief (pp. 12–18), section 6 of the Raker Act prohibits sale for resale; but it is equally true that the section prohibits the granting, by way of agency or otherwise, of the right to sell. It has never been the Government's position that section 6 prohibited only a sale for resale. It was, and still is, its position that the facts here show that there was a sale; however, the breach occurs not in the sale, but in transferring with it the right to sell. Hence, any method or means whereby the City confers upon the Pacific Gas & Electric Company, or any other private corporation or individual, the privilege of selling this energy, as a matter of right, in the course of such transferee's business is equally violative of the provisions of the Act and subject to injunction. It should be recalled, however, that in this case the trial court found, upon ample evidence, that the City did in fact sell the energy to the Pacific Gas & Electric Company for resale by that company.

1. The fact that the pertinent language of section 6 of the Raker Act is identical with and possibly derived from section 6 of the Act of June 30, 1906, c. 3926, 34 Stat. 803 (Br. 18–25) is important only to rebut the thought that the language was derived from the California Constitution, Art XIV, sec. 2. Other than that, it has but little relevance

here. Certain features of the origin of this Act should be noted, however.

A certified copy of the complete letter of President Theodore Roosevelt to Secretary of the Interior Hitchcock, as it appears in the files of the Interior Department, is printed in the Appendix, p. 26. From this it appears that the sole controversy occasioning intervention of the President was whether the municipality of Los Angeles should have the right to convey water across the public lands for purposes of irrigation.

The prohibition against selling or letting to an individual or corporation the right to sell water given to it or him by the City of Los Angeles, so far as appears, originated with the President. And it appears from his letter that this suggestion was inspired by the fact that his attention had been drawn to the right of private power interests, in the absence of law "to seek their own pecuniary advantage in securing the control of this necessary of life for the city." His underlying purpose in suggesting the prohibition is made plain by a part of the letter carefully omitted by appellant:

> * * * it ought not to be within the power of private individuals to control such a necessary of life as against the municipality itself.

Thus, even in the genesis of the precursor of the provision here involved, the underlying object was not merely to prevent private ownership of the

water with the right to resell but to prevent the vesting of control of the water in private interests. The City suggests no other reason for inclusion of section 6 in either the Owens River enactment or the Raker Act.

It was thus quite appropriate that in limiting the scope of the law, President Roosevelt, not a lawyer, should use "given" as including any manner of acquisition of control of the water either by transfer of title or merely of possession. The fact that this properly measures the underlying objective probably explains why the phrase, "for irrigation purposes," was omitted when the additional section was drafted. If any significance is to be given to the fact that section 6 of the Raker Act was possibly derived from section 6 of the Los Angeles grant, it must be noted that the phraseology adopted was that of a layman, giving added weight here to the general rule that Congress is to be presumed to have used words in their known and ordinary signification, and that the popular or received import of words furnishes the general rule for the interpretation of public laws. *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552, 560; *United States* v. *Wurts,* 303 U. S. 414, 417.[2]

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[2] Webster's New International Dictionary (2d ed., Unabridged) defines "sale": "a contract whereby the absolute, or general, ownership of property is transferred from one person to another for a price, or sum of money, or, loosely,

Other than the naked language of the letter there is no showing of the intention of the President, and other than the same naked words of section 6 of the Owens River Act there is no showing of the intention of that Congress in enacting that section.

2. Here the broad meaning of the words themselves embracing grant of the right to sell by agency agreement as well as by a sale is confirmed by many manifestations of the intent of Congress to prevent private control of the water or energy generated at Hetch Hetchy. Pertinent quotations from the Congressional Record are found in the opinion of the court below (R. 98–100), the opinion of Secretary Ickes (R. 264–266), and the opinion of Solicitor Edwards (R. 348–352). Since throughout the consideration of this legislation there was common agreement as to purpose, these statements made in debate may properly be considered in determining what the purpose was and the evils sought to be remedied. *Federal Trade Comm.* v. *Raladam Co.*, 283 U. S. 643, 650; *Humph-*

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for any consideration"; "sell": "to transfer (property) for a consideration; * * * to give up for a valuable consideration; to dispose of in return for something"; "let": "to give or assign, as a work or contract; —often with *out;* as, to *let* a farm, a house; to *let* out the lathing and the plastering. * * * To permit; allow; suffer; —either affirmatively, by positive act, or negatively, by neglecting to restrain or prevent; as, *let* to bail * * *." It seems clear that understood in this popular sense the statute embraces the transfer of the right to sell, even under an agency agreement, in return for the promises of the Company.

rey's Executor v. *United States,* 295 U. S. 602, 625.

The absence of debate in connection with the Owens River Act is to be compared with the lengthy debate on the Hetch Hetchy Bill in the House (covering more than 100 pages of the Congressional Record) and in the Senate (covering more than 200 pages). The reason is plain. In the Owens River grant the United States was granting a right-of-way over a forest reserve, whereas here it was granting rights in a national park as well.[3] There is a fundamental difference between these two types of reservations. The establishment and

[3] By the Act of June 30, 1864, c. 184, 13 Stat. 325, Congress granted to the State of California the "Cleft or Gorge" in the Sierra Nevada Mountains known as the Yo-Semite Valley. By Act of October 1, 1890, c. 1263, 26 Stat. 650, 16 U. S. C. sec. 44, Congress set aside and reserved as forest lands an area surrounding the Yosemite Gorge and including the Hetch Hetchy Valley. By Act of February 7, 1905, c. 547, 33 Stat. 702, Congress segregated and set aside as Yosemite National Park the major portion of the forest reserve, including both the Hetch Hetchy Valley and the area surrounding the grant to the State, and including as well certain additional lands not important here. By Joint Resolution of June 11, 1906, 34 Stat. 831, 16 U. S. C. sec. 48, Congress accepted and ratified recession of the lands granted to the State of California in 1864. The parts of Stanislaus National Forest through which the aqueduct and transmission line of the City extend were reserved by Presidential Proclamation of July 25, 1905, under Act of March 3, 1891, c. 561, sec. 24, 26 Stat. 1103, and by proclamation of October 26, 1907, under Act of June 4, 1897, c. 2, 30 Stat. 36.

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administration of national parks involves the permanent sequestration of natural objects and the inviting of the public to enter and use the areas, even the offering of inducements to accomplish this object. Such a use is incompatible with the granting of rights in national parks to commercial interests except such as will facilitate the use of the parks for recreational purposes. The national forest reservations are established and administered primarily for the preservation of the forests for commercial exploitation, and the use of the areas by the public is subordinate to that object. This use is consistent with the granting of rights in national forests to commercial interests. Because of this difference in the nature and objects of the reservations, Congress has always been more lenient in granting rights to commercial interests in national forests than in the case of national parks. This is illustrated by the fact that Congress has reserved to itself the sole power to grant authorizations for works for the storage or carriage of water within national parks. See Act of March 3, 1921, c. 129, 41 Stat. 1353, 16 U. S. C. sec. 797(d). The debates in Congress show that opposition to the Raker Act came from those who stressed the fact that this land had been dedicated to the use of all as a national park and were opposed to any grant of privilege therein which might come under the control of private interests or which might be regarded as opening the door to grants to private

interests of rights in this or any other national park. 50 Cong. Rec., pp. 3898–3899, 3911–3912, 3918, 3971, 4094–4095, 4098–4099, 4110, 5495; 51 Cong. Rec., pp. 182, 367, 380. See also 50 Cong. Rec., Part 7, Appendix, pp. 457–464, distinguishing between grants in forest reserves and in national parks. In no instance, either by congressional or administrative action, has any private commercial power development been allowed to invade a national park although such development is permitted in national forests. See Act of June 10, 1920, c. 285, sec. 4, 41 Stat. 1065, as amended by Act of March 3, 1921, 41 Stat. 1353, 16 U. S. C. sec. 797(d).

3. The ellipsis in section 6 of the Raker Act suggested by the City (Br. 3–7) is patently manufactured.

This Court is not to be misled by the reference in the City's brief (p. 4) to the Owens River bill:

> We wish to rivet attention on the word "*given*" because it was contained *in the first* draft of the prohibition, was not there associated with the words "sold or" but stood alone. *The words "sold or given" appeared for the first time in the second draft.*

Development in form of the Owens River bill enacted by another Congress is plainly without any significance in ascertaining the intent of the 63d Congress in the Raker Act. As is shown by the City's brief (pp. 26–27) both "given" and "sold"

appeared in the drafts of the Raker Act from the beginning.

Reading of section 6 in its plain grammatical sense makes it clear that the words "given" or "sold or given" are in no way the correlative of the prohibited "selling or letting." The ~~participles~~ verb forms, "selling or letting," are used as nouns, object of "from" in the prepositional phrase, "from selling or letting," which modifies the verb, "prohibited." On the other hand, "sold or given to it or him by the said grantee" describes and modifies "water or the electric energy" in the same phrase. Obviously, "given" cannot mean the same thing as "selling or letting."

Aside from the fact that the alleged ellipsis authorizing insertion of additional words is without support in reason, the City's contention is negatived by the fact that in debate Representative Thomson, a member of the House Committee on Public Lands, called specific attention to the difference between this prohibition against selling or letting the "right to sell" and a prohibition against selling or letting "any water or electric energy" such as the City suggests is the true meaning of this statute (50 Cong. Rec., p. 3999, August 30, 1913):

> Mr. Chairman, in answering the question of the gentleman from Colorado, I would like to call his attention to the fact that the subject of sale as printed in this section is not the power or the water, but the right to sell the power or the water.

The City concedes that "given" has many significations (Br. 6) and does not question that "give" may properly be used in the sense of mere delivery or transfer of possession without the conferring of title. *Smith* v. *Burnet,* 35 N. J. Eq. 314, 324; *Thompson* v. *West,* 56 N. J. Eq. 660, 665, 40 Atl. 197; *Roland* v. *Schrack,* 29 Pa. 125, 127; *Spencer* v. *Potter's Estate,* 85 Vt. 1. However it invokes the rule *noscitur a sociis* here to make "given" mean the same as "sold" (City's Br. 5). But the maxim cannot be employed to render general words meaningless in disregard of the primary rules that effect should be given to every part of a statute, if legitimately possible (*Market Co.* v. *Hoffman,* 101 U. S. 112, 115; *Ex Parte Public Bank,* 278 U. S. 101, 104) and that words of a statute or other document are to be taken according to their natural meaning. *Mason* v. *United States,* 260 U. S. 545, 553–554. Since the City excludes the meaning: transfer of title without consideration,[4] it follows that if pursuant to these rules any effect is to be attached to the word "given," it must necessarily here mean mere transfer of possession, such as that incidental to an agency.

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[4] The assertion of the City is (Br. 5):

"When these drafts were drawn, it is to be presumed that the idea of a municipality making a gift of water or electric energy to a corporation or individual was not thought of, and that therefore, as a matter of actual intent, that possibility was not present in the minds of those who drafted or adopted the prohibition."

The appellant's manufactured ellipsis requires interpolation of words changing the plain meaning, unduly limits the operation of the statute, and ignores its underlying purpose apparent from its face and as indicated by the committee report and congressional debates.

The language of the statute is plainly broad enough to inhibit the obtaining of private control of water or energy originating at Hetch Hetchy either by sale for resale or by the granting of an agency. Even were the citations to congressional debates deemed conclusively to show that Congress did not at the time of the enactment have in mind the possibility of evasion of the prohibition by an agency agreement, that would not be enough. To exclude such an agreement from the operation of the Act it is necessary to go further and to say that if the possibility had been foreseen, Congress would have so varied its comprehensive language as to exclude such agency from the operation of the Act. *Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 257.

C. The Raker Act is to be construed liberally in aid of the evident public object

In the course of oral argument the invocation of the recognized rule of liberal construction otherwise here applicable (Gov't Br. p. 64) was questioned in view of the fact that the Act in the proviso to section 6 contains a forfeiture clause which is subject to the rule of strict construction.

The second clause of section 6, stated in the form of a proviso, plainly does not relate to the same subject matter as, or restrain, modify, or other-

wise affect, the first clause. The word "Provided" has no significance here, simply serving to separate or distinguish the two clauses. *Georgia Banking Co.* v. *Smith,* 128 U. S. 174, 181; *McDonald* v. *United States,* 279 U. S. 12, 22.

The rule properly to be applied appears to be that the forfeiture provision is to be strictly construed, but the statute in its other principal features, including the first clause of section 6 here involved, is, as in the case of a remedial statute, to be liberally construed in aid of the evident public object. *Smith* v. *Townsend,* 148 U. S. 490, 497; *State* v. *Shevlin-Carpenter Co.,* 99 Minn. 158, 162, 108 N. W. 935, 936; cf. *Eyre* v. *Harmon,* 92 Cal. 580, 587–588, 28 Pac. 779; see Sutherland, Statutory Construction (1904 ed.), sec. 337, p. 646, sec. 533, p. 991.

D. Paragraph (3) of the decree does not forfeit the rights of the City

The City's brief (pp. 35–38) and the Outline of Oral Argument (pp. 4–7) apparently are to be read together.

The Government has never contended that the provision under consideration here is *stricti juris* a condition; it is a restrictive provision inserted by the Government as grantor in a statutory conveyance. The limitation imposed by section 6 on the manner of use of the granted lands [5] is analogous to the limitation enforced in

[5] In support of its contention that it owned all the water rights now claimed in the Hetch Hetchy Valley at the time of the Raker Act, the City merely cites congressional debates which, of course, have no weight on that question

Oreg. & Cal. R. R. Co. v. *United States,* 238 U. S. 393, and as held by the court below (R. 101–104) is equally effective and valid.

Paragraph (3) of the decree is not subject to criticism as being in effect a forfeiture of the rights granted (Outline of Oral Argument, p. 5). There is, of course, no question of forfeiture involved in the enforcement by injunction of the first clause of section 6, here invoked, since it is merely an express limitation on the exercise of the rights and privileges granted. Paragraph (3) in form purports to declare no forfeiture. Furthermore, read with paragraph (2) it is apparent that its effect is merely to enjoin what is in substance a continuing trespass upon the lands of the United States insofar as those lands are used for a purpose not contemplated by the grant. *Van O'Linda* v. *Lothrop,* 21 Pick. (Mass.) 292, 297; *Ganley* v. *Looney,* 96 Mass. (14 Allen) 40, 42 (1867); *Shock* v. *Lumber Co.,* 107 W. Va. 259, 263, 148 S. E. 73.

(Br. 40–44). The right to appropriate waters on the public lands of the United States deraigns not from the State but from the United States as owner of such running water on the public lands. *California Power Co.* v. *Beaver Cement Co.*, 295 U. S. 142, 162; *Brush* v. *Commissioner*, 300 U. S. 352, 367; *Lux* v. *Haggin*, 69 Cal. 255, 336 et seq., 10 Pac. 674. As against the paramount authority of the United States, no rights in the water on the lands of the national park and forest reservation vested in the City until, under authority of the Raker Act, it had completed the works essential to the diversion and application to beneficial use. *Silver Lake, etc., Co.* v. *Los Angeles*, 176 Cal. 96, 103–104, 167 Pac. 697.

Injunction, of course, is the proper remedy to inhibit the use of the flowage waters, dam, aqueduct, and transmission lines (which occupy the easement) for purposes other than those specifically designated in the grant of the easement. *Gray* v. *Cambridge,* 189 Mass. 405, 76 N. E. 195; *Winslow* v. *City of Vallejo,* 148 Cal. 723, 727–728, 84 Pac. 191.

The decree clearly does not declare a forfeiture of any right of the City. In its effect it is not distinguishable from that directed to be entered in *Mendelson* v. *McCabe,* 144 Cal. 230, 77 Pac. 215. Injunction thereunder will merely inhibit the exercise of a privilege usurped; it will not deprive the City of any right conferred upon it.

CONCLUSION

It is respectfully submitted that the decree of the court below should be affirmed.

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APPENDIX

The pertinent sections of the California Constitution of 1879 provide:

Article XI:

> SEC. 19. In any city where there are no public works owned and controlled by the municipality, for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose, under and by authority of the laws of this state, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe, for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight, or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof.

Article XI (as amended October 10, 1911):

> SEC. 19. Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service, or other means of communication. Such works may be acquired by original construction or by the purchase of existing works,

including their franchises, or both. Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries; provided that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance.

Article XIV.

Sec. 1. The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law; provided, that the rates or compensation to be collected by any person, company, or corporation in this state for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed, annually, by the board of supervisors, or city and county, or city or town council, or other governing body of such city and county, or city, or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water

rates, where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further processes and penalties as the legislature may prescribe. Any person, company, or corporation collecting water rates in any city and county, or city, or town in this state, otherwise than as so established, shall forfeit the franchises and waterworks of such person, company, or corporation to the city and county, or city, or town, where the same are collected, for the public use.

SEC. 2. The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law.

On December 19, 1913, the charter of the City and County of San Francisco, Art. II, c. II provided:

SEC. 1. Subject to the provisions, limitations and restrictions in this charter contained, the board of supervisors shall have power:

* * * * *

2. Except as otherwise provided in this charter, or in the constitution of the State of California, to regulate and control for any and every purpose, the use of the streets, highways, public thoroughfares, public places, alleys, and sidewalks of the city and county.

14. To fix and determine by ordinance in the month of February of each year, to take effect on the first day of July thereafter, the rates or compensation to be collected by any person, company or corporation in the city and county, for the use of water, heat, light or power, supplied to the city and county, or

to the inhabitants thereof, and to prescribe the quality of the service.

SEC. 5. No exclusive franchise or privilege shall be granted for laying pipes, wires or conduits.

SEC. 6. The board of supervisors shall have power to grant authority for a term not exceeding twenty-five years to construct and operate street railways upon, or over, or under, the streets or parts of streets of the city and county not reserved for boulevards or carriage driveways, upon the following conditions and in the following manner and none other:

Upon application being made to the board for any such franchise, it shall by resolution determine whether such franchise or any part thereof should be granted, and at said time shall determine on what conditions the same shall be granted additional to those conditions provided in this chapter. After such determination, it shall cause notice of such application and resolution to be advertised in the official newspaper of the city and county for ten consecutive days. Such advertisement must be completed not less than twenty nor more than thirty days before any further action is taken by the board on such application. The advertisement must state the character of the franchise sought, the term of its proposed continuance, and the route to be traversed; that sealed bids will be received up to a certain hour on a day to be named in the advertisement; and a further statement that no bids will be received of a stated amount, but that all bids must be for the payment to the city and county in lawful money of the United States of a stated percentage of the gross annual receipts of the person, company or corpora-

tion to whom the franchise may be awarded, arising from its use, operation, enjoyment, or possession. * * *

SEC. 7. The supervisors shall have no power to grant franchises or privileges to erect poles or wires for transmitting electric power or for lighting purposes along or upon any public street or highway of the city and county except upon all the conditions and in the manner, including competitive bidding and payment of a percentage of gross receipts, hereinbefore set out, and upon the further condition that the board shall at all times have the right to regulate the charges of any person, company or corporation using, enjoying or possessing such franchise or privilege.

* * * * *

[Copy]

THE WHITE HOUSE,
Washington, June 25, 1906.

MY DEAR MR. SECRETARY: As I think it best that there should be a record of our attitude in the Los Angeles Water Supply bill, I am dictating this letter to you in your presence, and that of Senator Flint on behalf of the California Delegation, of Director Walcott of the Geological Survey, and of Chief Forester Pinchot. The question is whether the city of Los Angeles should be prohibited from using the water it will obtain under this bill for irrigation purposes. Your feeling is that it should be so prohibited because the passage of the bill without the prohibition might establish a monopoly in the municipality of Los Angeles as regards irrigation, by permitting the municipality to use the surplus of the water thus acquired, beyond the

amount actually used for drinking purposes, for some irrigation scheme.

Senator Flint states that under the proposed law Los Angeles will be seeking to provide its water supply for the next half century, which will mean that at first there will be a large surplus, and that in order to keep their rights they will have to from the beginning draw the full amount of water (otherwise the water will be diverted to other uses and could not be obtained by the city); and while if the city did not need the water it would be proper that the other users should have it, yet it is a hundred or a thousand fold more important to the State and more valuable to the people as a whole if used by the city than if used by the people of Owens Valley. Senator Flint further says that the same water that is used for drinking and washing is also used on innumerable little plots of land in and around Los Angeles for gardening and similar purposes, and that to prohibit this would so nearly destroy the value of the bill as to make it an open question whether the city either could or would go on with the project; it being open to doubt whether the words "domestic use" would cover irrigation of this kind.

Mr. Walcott and Mr. Pinchot state that there is no objection to permitting Los Angeles to use the water for irrigating purposes so far as there is a surplusage after the city's drinking, washing, fire, and other needs have been met. They feel that no monopoly in an offensive sense is created by municipal ownership of the water as obtained under this bill, and that as a matter of fact to attempt to deprive the city of Los Angeles of the right to use the water for irrigation would mean that for many

years no use whatever could be made by it of the surplus water beyond that required for drinking and similar purposes.

I am informed by Senator Flint that the law of California provides that if a municipality sells water to people outside the municipality, it must be at the same rate that it sells it to those within the municipality.

I am also impressed by the fact that the chief opposition to this bill, aside from the opposition of the few settlers in Owen's Valley (whose interest is genuine, but whose interest must unfortunately be disregarded in view of the infinitely greater interest to be served by putting the water in Los Angeles) comes from certain private power companies whose object evidently is for their own pecuniary interest to prevent the municipality from furnishing its own water. The people at the head of these power companies are doubtless respectable citizens, and if there is no law they have the right to seek their own pecuniary advantage in securing the control of this necessary of life for the city. Nevertheless, their opposition seems to me to afford one of the strongest arguments for passing the law, inasmuch as it ought not to be within the power of private individuals to control such a necessary of life as against the municipality itself.

Under the circumstances I decide, in accordance with the recommendations of the Director of the Geological Survey and the Chief of the Forestry Service, that the bill be approved, with the prohibition against the use of the water by the municipality for irrigation struck out. I request, however, that there be put in the bill a prohibition

against the City of Los Angeles ever selling or letting to any corporation or individual except the municipality, the right for that corporation or that individual itself to sell or sublet the water given to it or him by the city for irrigation purposes.

Sincerely yours,

(signed) THEODORE ROOSEVELT.

Hon. E. A. HITCHCOCK,
Secretary of the Interior.

P. S.—Having read the above aloud, I now find that everybody agrees to it—you, Mr. Secretary, as well as Senator Flint, Director Walcott, and Mr. Pinchot; and therefore I subscribe to it with a far more satisfied heart than when I started to dictate this letter.

U. S. GOVERNMENT PRINTING OFFICE: 1939